In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 447

THOMAS M. SMITHER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 6-8) is reported at 91 F. Supp. 582.

JURISDICTION

The judgment of the Court of Claims was entered on July 10, 1950 (R. 9). A motion for a new trial was filed on July 31, 1950 and denied on October 2, 1950 (R. 9). The petition for a writ of certiorari was filed December 11, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255.

QUESTIONS PRESENTED

1. Whether the finding that the value of petitioner's land in January 1944 was $1,575.90 is erroneous.

2. Whether the findings of the Court of Claims are vitiated because the commissioner who reported to the court did not hear the evidence.

STATUTES AND RULES INVOLVED

The relevant statutory provisions relating to the procedure in the Court of Claims and the material rules of that Court are set out in the argument, *infra,* pp. 5-6.

STATEMENT

This petition seeks review of a judgment of the Court of Claims awarding $1,575.90 plus interest as just compensation for the taking of some 157 acres of land in Shasta County, California. The land was permanently flooded in January 1944 by the operation of Shasta Dam, resulting, as the Court of Claims found (Fdg. 5, R. 5), in a taking of a fee simple interest therein. The disputed questions relate solely to the market value of the tract. The facts relating thereto, as found by the Court of Claims, may be briefly summarized as follows:

This tract was steep rolling mountain land covered with brush and a scattering of scrub oak and bull pines. It was very poor pasture land and lacked road access. (Fdg. 3, R. 4.) Petitioner contended that the tract had special value as a site for

a reservoir and also special value for recreational or resort purposes on the theory that a 420 foot dam would have left eight acres unflooded. After describing the Shasta Dam project which involved the acquisition of some 60,000 acres of land, a large part of which was public domain, and the relocation of highways, railroads and transmission lines, the court found that there was no reasonable probability that any private concern would have undertaken the Shasta Dam project (Fdg. 6, R. 5-6). As to the claim for recreational or resort value for the eight acres, the court found that although a 420-foot dam was first proposed, as the plans finally developed and the contract let, a 480-foot dam was provided for, a map prepared by a local government representative in 1938 showed that the tract here involved would be part of the reservoir and its acquisition was contemplated from that date (Fdg. 4, R. 4-5).[1]

The court's opinion (R. 6-8) concluded that the land did not have special value for reservoir purposes because there was no reasonable probability that such a project would be built by private enterprise. It also concluded that the eight acres did not have special value as being near, but not part of, the reservoir because there was only a single project which included that tract and because the

[1] Condemnation proceedings were not instituted because it was thought that, being tax delinquent, California law permitted use of this land for reclamation purposes without charge.

court was not convinced that the smaller dam would have created special recreational value as claimed by petitioner.

While the record is silent on the subject, the fact is, as stated by petitioner (Pet. pp. 2-4), that after the evidence was taken the case was transferred from Commissioner Nagle to Commissioner Foster, who made the report. The order does not state the reason for this action but it was due, we believe, to illness of Commissioner Nagle, which later proved fatal.

ARGUMENT

1. In arriving at its determination of value, the Court of Claims correctly applied the controlling principles of law. A special value for this land for use for reservoir purposes could be considered only if the construction of such a project was so reasonably probable that the market value of the land was thereby enhanced. *Olson* v. *United States,* 292 U.S. 246; *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266; *Continental Land Co.* v. *United States,* 88 F. 2d 104 (C.A. 9), certiorari denied, 302 U.S. 715. The magnitude of the project, the necessity of acquiring a large area of public domain and of relocating highways, railroads and transmission lines confirm the rejection of petitioner's assertion of existence of a reasonable probability that a private power company would construct the project.

The findings of the court likewise conclusively

dispose of the attempt to include recreational value in the award. As the court stated (R. 8), there was only a single project and a single taking, hence the language from *United States* v. *Miller*, 317 U.S. 369, concerning two distinct takings (Pet. pp. 15-16) is irrelevant here. Moreover, there was not sufficient evidence to convince the court that a smaller dam would have created special recreational value. As the court found (Fdg. 7, R. 6): "In the few transfers that were effected [in the vicinity], the transactions did not reflect any special value in the land as a reservoir basin or for recreational or resort purposes."

2. Although the fact does not appear in the record, petitioner argues that the judgment is vitiated because the commissioner who presided at the taking of the evidence did not make the report.[2] The argument misconceives the requirements applicable to commissioners of the Court of Claims. The statutes authorizing commissioners provide that they shall "in accordance with the rules and orders of the court * * * receive evidence and report findings of fact and recommendations for conclusions of law in cases assigned to them" (28 U.S.C. 792), and that "The rules of the court shall provide for a finding and report of facts by a commissioner, and when directed by the court his recommendations for conclusions of

[2] Our file does not indicate that any objection was made by petitioner to the change of commissioners until after the report had been made. Cf. Pet. p. 4.

law, to be filed in court with the testimony upon which the same is based, and for opportunity to file exceptions thereto, and a hearing thereon within such reasonable time as the court's rules or order may prescribe. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner" (28 U.S.C. 2503).

The fact that commissioners' recommendations are advisory only and that the findings of fact are made by the court is made apparent by the rules of the Court of Claims. See especially Rule 75 that where both parties request it, "the court will make and enter special findings of fact as part of its judgment" and Rule 76 that when a commissioner has made a report the party requesting a special finding of fact shall follow a prescribed form. The court rules seem to contemplate the procedure followed here, since Rule 40 provides "When a case has been referred to a commissioner of the court and proof has been closed by both parties, the commissioner shall proceed to ascertain the facts, including ultimate facts, considered by him to be established by the evidence, and make a report of his findings to the court within a reasonable time." And Rule 41 refers to procedure "If the proof has not been closed at the time of the reference." See also Rule 51 governing instances where a commissioner is unable to take testimony in a case.

In view of the express reference in the pro-

visions of Title 28 *supra* to court rules, there can be no question as to authority for their adoption. The authority of Congress in the matter is equally clear, since it was legislating as to the procedure under which the United States can be sued. Petitioner's claim that the procedure prescribed violates due process of law plainly, therefore, lacks merit.

In any event, there is not, as petitioner urges, an inexorable rule that the fact finder must personally hear the testimony. In *Labor Board* v. *Mackay Co.*, 304 U.S. 333, at the conclusion of the testimony but prior to oral argument before the examiner the proceeding was transferred to Washington and heard by the Board. This Court held that failure to follow the usual procedure of submission of a tentative report by the trial examiner did not constitute denial of a full and adequate hearing, saying (p. 351): "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan* v. *United States,* 298 U.S. 468, 478." So here, petitioner was not deprived of any opportunity to present evidence. He had ample opportunity to argue his position both by briefs and by personal appearance before the Court of Claims. As the findings and opinion show, the court below based its conclusions upon the evidence submitted and contentions urged; hence, the present case is entirely different from the situation presented in *Morgan* v. *United States,* 298 U.S. 468, and *Ohio*

Bell Telephone Co. v. *Public Utilities Commission,* 301 U.S. 292, relied upon by petitioner (Pet. pp. 11-12).

In *National Labor Relations Board* v. *Stocker Manufacturing Company* (C.A. 3, No. 10,262, decided November 28, 1950), it was held, following the *Mackay* case *supra,* that the making of findings and recommendations by a second trial examiner upon the transcribed record, after the examiner who received the testimony had died, did not violate due process or applicable statutes. Decisions seemingly to the contrary are: *S. Buchsbaum & Co.* v. *Federal Trade Commission,* 153 F. 2d 85 (C.A. 7) and *Smith* v. *Dental Products Co.,* 168 F. 2d 516 (C.A. 7). However, in the *Buchsbaum* case a writ of certiorari was granted and the case was remanded for consideration of other errors assigned, a motion for leave to file a waiver of the assigned error on the procedural question having been granted. *Federal Trade Com.* v. *S. Buchsbaum & Co.,* 328 U.S. 818. The *Smith* case makes no mention of this Court's decision in the *Mackay* case, and the primary ground for the decision was that no findings of fact and conclusions of law had been made as required by the Federal Rules of Civil Procedure. Moreover, the court was there discussing a hearing before a Master, whose findings are to be approved unless they are clearly erroneous (Rule 53(e)(2), F.R.C.P.). The case is, therefore, distinguishable from the present one where the

findings are ultimately made by the court. Finally, it should be noted that neither a jury trial nor any other particular procedure is required in proceedings to determine the value of property taken by exercise of the power of eminent domain. See summary of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 78-79. There is nothing to indicate that there were presented questions concerning the demeanor of witnesses, or that petitioner suffered prejudice from the procedure followed by the court below.

CONCLUSION

The decision of the court below is correct, and the case does not warrant review. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
A. DEVITT VANECH,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

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